# BEFORE THE MEDICAL BOARD OF CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
VIVEK GUPTA, M.D.	)	Case No. 8002015013153
Physician's and Surgeon's	)	
Certificate No. A 118825	)	
Respondent.	)	
	)	

# **DECISION AND ORDER**

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on February 3, 2017.

IT IS SO ORDERED January 6, 2017.

MEDICAL BOARD OF CALIFORNIA

 $\mathbf{R}_{\mathbf{v}}$ .

Jamie Wright, J.D., Chair

Panel A

# BEFORE THE MEDICAL BOARD OF CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS STATE OF CALIFORNIA

In the Matter of the Accusation Against:

VIVEK CHANDER GUPTA, M.D.

Physician's and Surgeon's Certificate No. A118825,

Respondent.

Case No. 800-2015-013153

OAH No. 2016040895

#### PROPOSED DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), on November 1, 2 and 3, 2016, in Los Angeles, California. Complainant was represented by Brian D. Bill, Deputy Attorney General. Vivek Chander Gupta, M.D. (Respondent) was present and was represented by Michael Firestone, Attorney at Law.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on November 3, 2016.

#### **FACTUAL FINDINGS**

- 1. On March 23, 2016, Kimberly Kirchmeyer (Complainant) filed the Accusation while acting in her official capacity as the Executive Director of the Medical Board of California (Board), Department of Consumer Affairs.
- 2. Respondent filed a Notice of Defense requesting a hearing on the Accusation, and this matter ensued.
- 3. On October 26, 2011, the Board issued Physician's and Surgeon's Certificate Number A118825 to Respondent. That certificate was in full force and effect at all relevant times and is scheduled to expire on September 30, 2017.

- 4. On March 3, 2015, in the Superior Court for the State of California, County of Riverside, Respondent was convicted, on his plea of guilty, of violating Vehicle Code sections 23152, subdivision (a)(driving under the influence of alcohol) in conjunction with Vehicle Code section 23578 (violation of V.C. 23152 involved blood alcohol concentration of .15 percent or higher), a misdemeanor.
- 5(a). As a result of his conviction, Respondent was placed on probation for 36 months under terms and conditions which included payment of fines and fees, completion of a nine-month first-offender DUI (driving under the influence) program, attending 22 Alcoholics Anonymous (AA) meetings, attending a Mothers Against Drunk Driving (MADD) DUI Victim Impact Panel presentation, and serving 22 days in custody under an electronic monitoring program.
- 5(b). Respondent completed the DUI program and attended 22 AA meetings and the MADD presentation. He served 11 days of his 22-day electronic monitoring program and was issued a completion notice on March 23, 2015.
  - 5(c). Respondent is scheduled to remain on criminal probation until March 2018.
- 6. The facts and circumstances surrounding Respondent's conviction are as follows:
- (a). On November 29, 2014, Respondent and his brother went to a party at the home of family friends in Hemet, California. While at the party, Respondent drank several alcoholic drinks which were stronger than he realized at the time. He and his brother left the party, and Respondent believed he was able to drive. Respondent intended to drop off his brother at their parents' nearby home before continuing on to his home in Redondo Beach. While driving to his parents' home on an unlit, curving, descending road, Respondent went around a left-turning curve traveling at 25 miles per hour in a 10 mile per hour zone. Due to his impairment from alcohol and his speed, he was unable to safely negotiate the curve and his vehicle swerved off the road and down a dirt embankment, colliding with a large boulder. Both the driver's and passenger's airbags deployed.
- (b). Emergency personnel extricated Respondent from his vehicle, where he had been trapped. He was transported to Riverside County Regional Medical Center (RCRMC) via ambulance. At the RCRMC emergency room, a police officer interviewed Respondent while he was lying on a gurney. The officer observed that Respondent's eyes were red and watery, and his breath had a strong odor of alcoholic beverage. The officer noted that Respondent was cooperative during the interview. When asked what he had been drinking, Respondent replied, "whiskey." When asked how much, he stated "Way too much." (Exhibit 8.)
- (c). A blood specimen collected from Respondent on November 29, 2014, at 10:42 p.m., revealed that Respondent had a blood alcohol concentration (BAC) of .22 percent.

- 7. Respondent's brother was not seriously injured in the accident, but Respondent suffered several rib fractures, a lung contusion, and a left calcaneus fracture. He eventually had surgery to place a metal plate in his heel, and he was sent home in a cast. After two months of non-weight bearing status, he was able to use a walker and then a cane to walk. Respondent had to undergo rehabilitation to regain mobility in his heel, and the plate was later surgically removed from his heel.
- 8. Respondent self-reported his conviction to the Board, which was received by the Board on April 14, 2015. Additionally, after recovering from his injuries and returning to work, Respondent informed his supervisor about his DUI. They reported the DUI to Health Care Partners and to all three hospitals where Respondent worked.
- 9. On August 25, 2015, Respondent wrote a letter to the Board to explain his conviction. In his letter he stated:

I was at a family event, and I had too much to drink and made the very poor and regrettable decision to drive. As an MD, I should have known the risks, but unfortunately I made an error of judgment and ultimately was convicted of DUI. I know my actions were stupid and dangerous, and I take great solace that no one else suffered any financial or physical consequences.

Since that time, I have taken many affirmative steps to make sure this will never happen again. I have stopped drinking, attended all of the required DUI classes and AA meetings, paid all the required fines, and have been fully compliant with the law. I am currently seeing a therapist to help me with my sobriety, and as a Buddhist, am focusing on meditating and being more mindful of my actions in general.

I can honestly say that this will definitely never happen again. I am determined to learn from this episode, and I see the aftermath as an opportunity for personal growth more than anything else.

# (Exhibit 9.)

- 10(a). On July 1, 2015, Respondent began individual psychotherapy with Steven B. Friedman, Ph.D., a licensed psychologist who specializes in the treatment of alcohol and substance use disorders. They met approximately every week and a half.
- 10(b). At the administrative hearing, Dr. Friedman testified credibly on Respondent's behalf. He noted that Respondent sought treatment to work on anxiety and to ensure he was not a substance abuser in the future. According to Dr. Friedman, Respondent also had a "potpourri of issues" including minor family issues, over eating, and a need to be a "pleaser." Respondent's main issue was his need to be liked and to please others, which was driven by an underlying anxiety. Alcohol was used to quell that anxiety which he experienced in social groups.

- 10(c). Dr. Friedman observed that Respondent was very compliant with therapy and that he had gained insight into his motivations and learned ways to cope with the anxiety which was the major provocation for drinking. Respondent was very proactive in his therapy and began practicing mindfulness, which Dr. Friedman described as an awareness of thoughts and feelings. Respondent also adopted a healthy lifestyle which included meditating and getting regular exercise and sufficient quality sleep.
- 10(d). Prior to December 2015, Respondent proposed an experimental program to engage in controlled social drinking in order to explore his use of alcohol. He set guidelines of limiting his alcohol consumption to 1-2 drinks on social occasions when his wife was present. Respondent was successful as a controlled drinker, but on at least one occasion, he exceeded his two-drink limit and that concerned him since any small step toward drinking excessively was "absolutely the direction he did not want to go." (Dr. Friedman's testimony.) However, Dr. Friedman did not believe that Respondent's exceeding his self-imposed guideline was concerning, and he noted Respondent did not report any cravings for alcohol. Dr. Friedman is aware that Respondent later decided to remain completely sober and that he voluntarily submitted to biological fluid testing for the eight months prior to this hearing with negative results. Dr. Friedman observed that this demonstrated Respondent can not only "live alcohol free, but can thrive alcohol free."
- 10(e). In light of Respondent's progress in therapy and his biological fluid testing history, Dr. Friedman opined that Respondent posed an extremely low risk of incurring another DUI.
- 11. On April 4, 2016, Respondent voluntarily enrolled in the Pacific Assistance Group Professional Monitoring & Support (PAG) program overseen by Tracy R. Zemansky, Ph.D. The term of the agreement was "6 months, renewable." (Exhibit EE.) The PAG program required Respondent to submit to random biological fluid testing. On April 5, 2016, Respondent submitted to a urine and hair test which was negative for alcohol. Additionally, according to a Test History Report from the testing laboratory for testing from April 13, 2016 through October 22, 2016, all urine tests were negative for alcohol.
- 12(a). On April 13, 2016, Respondent underwent a Diagnostic Evaluation with Gregory Skipper, M.D., the Director of Promises Professional Treatment Centers. Respondent reported his DUI with BAC of .22 percent and noted that he had been advised to undergo evaluation with John Harsany, M.D., a family friend in Hemet who works with the Wellbeing Committee at a hospital in Riverside County.

The history of Respondent's treatment with Dr. Skipper and Dr. Skipper's findings and conclusions were established by the credible testimony of Dr. Skipper, which was corroborated by the documentary evidence and Respondent's credible testimony.

- 12(b). Dr. Skipper conducted a records review, a patient history, a mental status examination, and an Internet/social media search. He also administered psychological testing which included: (1) the Minnesota Multiphasic Personality Inventory 2 (MMPI-2), which is a test of psychopathology to determine clinically significant personality patterns; and (2) the MicroCog, which is a neurological screening test of cognitive functioning. The results of the psychological testing were normal. Dr. Skipper also noted that on April 5, 2016, Respondent had met with Tracy Zemansky, Ph.D., who obtained samples of Respondent's urine and hair. At the time of Dr. Skipper's evaluation, Respondent had enrolled in a random biological sample testing with FirstLab and was checking in daily.
- 12(c). Respondent reported the circumstances leading to his DUI conviction, his compliance with his probation requirements, and his efforts at rehabilitation (exercise, meditation, spending more time with family). Respondent acknowledged that he had used poor judgment to drive while under the influence of alcohol. Respondent informed Dr. Skipper that he had stopped drinking alcohol for a few months after the accident and later resumed minimal alcohol consumption limited to beer and wine. The last time he drank alcohol prior to the April 13, 2016 evaluation was on Super Bowl Sunday.
- 12(d). Dr. Skipper noted that Respondent lives with his wife and two daughters. Both his mother and father are physicians. Respondent has a history of mild chronic anxiety, which was possibly hereditary. He had no history of any alcohol related problems prior to the 2014 DUI.
- 12(e). Dr. Skipper diagnosed Respondent with Unspecified Anxiety Disorder. He found that Respondent does not meet the criteria for a diagnosis of substance abuse disorder. Dr. Skipper ruled out substance abuse disorder by looking at Respondent's history of alcohol use and applying the criteria for a diagnosis of substance abuse disorder set forth in the Diagnostic and Statistical Manual of Mental Disorders, 5th Ed. (DSM-5).<sup>2</sup> Dr. Skipper opined that Respondent "is not at risk now or in the future and no further treatment is needed. The only reason for monitoring at this time is as a diagnostic process and to be prepared to show evidence before the medical board that he can and has stayed sober." (Exhibit B.)
- 13. At the administrative hearing Dr. Skipper testified credibly on Respondent's behalf. He noted that Respondent had completely stopped drinking alcohol after the April 13, 2016 evaluation. Respondent had also undergone voluntary urine testing from April 2016 through the date of the hearing and that all testing results were negative. Dr. Skipper acknowledged that having one DUI conviction is a risk factor for incurring a second, but also noted that Respondent has done many things to reduce that risk, including participation in support group meetings, compliance with the court-ordered probation requirements, voluntarily submitting to the monitoring program with random testing. Given Respondent's

<sup>&</sup>lt;sup>2</sup> The DSM-5 is published by the American Psychiatric Association. The Administrative Law Judge takes official notice of the DSM-5 as a generally accepted tool for diagnosing mental and developmental disorders.

insights and rehabilitative efforts, Dr. Skipper opined that Respondent would have no recurrent DUI.

- 14(a). On June 17, 2016, Respondent underwent an evaluation by John Harsany, Jr., M.D., a specialist in addiction medicine. Dr. Harsany testified at the administrative hearing on Respondent's behalf.
- 14(b). Dr. Harsany was acquainted with Respondent prior to June 17, 2016. He has a professional relationship with Respondent's mother and father who practice medicine in Hemet where Dr. Harsany also practices. Dr. Harsany has also socializes with Respondent's parents infrequently. However, he had no personal contact with Respondent prior to the evaluation. Additionally, Dr. Harsany's direct observations and his recollection of what Respondent reported to him were candid and credible. Consequently, no bias was established on his part which would discredit his testimony. Nevertheless, Dr. Harsany did demonstrate some confusion when discussing his diagnoses. In arriving at his diagnoses, Dr. Harsany utilized the DSM-IV, which had been significantly revised and replaced in 2013 by the DSM-5; Dr. Harsany testified that at the time of the 2016 evaluation, he was still "transitioning" from the DSM-IV. Additionally, Dr. Harsany's testimony regarding the criteria for his diagnoses was vague. Consequently, Dr. Harsany's DSM-IV diagnoses are disregarded.
- 14(c). As part of the evaluation, Dr. Harsany reviewed Respondent's medical records and the DUI police report, and he interviewed Respondent to obtain his history, his narrative about the DUI, and information about rehabilitative efforts. Dr. Harsany noted that Respondent experienced a one-time error in judgment without a history of excessive drinking or prior convictions. He found no evidence that Respondent chronically used alcohol, that he was dependent on or addicted to alcohol, or that he misused alcohol other than the one night at issue. Dr. Harsany pointed out that a DUI in a professional's life is a sentinel event, and the person must determine the cause of the event and to learn how to avoid recidivism. Respondent has completed all required programs and has learned a "deep lesson from his incident." Respondent also informed Dr. Harsany that he was committed to remaining abstinent from alcohol for the rest of his life. Dr. Harsany opined that Respondent's commitment to avoid recidivism and his sustained abstinence, as demonstrated by negative results from his months of biological fluid testing, rendered him a lower risk to sustain another DUI.
- 15. On July 12, 2016, Respondent wrote another letter to the Board to explain the circumstances surrounding his conviction and his continued rehabilitative efforts. In that letter he explained:

While at the party, I drank several alcoholic drinks which were stronger than I realized. At approximately 8:00 pm, I made a very stupid decision to drive back to my parent's [sic] house, which was nearby, and regretfully I allowed my younger brother to ride home with me. Before we reached my parent's [sic] house, and shortly after we

departed, my car ended up going off of aa hill and crashing into the ground below at a curve in the very windy road that we were driving downhill on. I was not driving at a high speed at the time of the accident and this particular curve has been the site of multiple roll-over accidents due to the topography/terrain.

This one decision to drive home that night has completely changed the trajectory of my life (for the better). While this is clearly the worst thing I have ever done, and of course I regret picking up my car keys that night, the subsequent series of events following the accident has forced me to grow physically, emotionally, psychologically, professionally, and spiritually more than I ever thought possible.

In saying the above, I am extremely grateful that [my] brother was completely unharmed. . . . [I]f anything had happened to him, I know that personal and societal redemption may not have been possible. I still have moments of panicked thoughts when reflecting [on] what may have been. I also know how difficult this entire ordeal has been for my parents and even more so my wife who had to continue taking care of our young family alongside an injured husband, not to mention the psychological stress I subjected them all [to] and I am truly grateful every day that they have stood by me through this entire ordeal.

# $[\P] \dots [\P]$

Spiritually, I feel this last year [and] a half completely changed my life. Whereas I had been meditating off and on for [the] last few years, after my physical recovery, I established a meditation practice two times a day for twenty minutes in each sitting. Through meditation and contemplation (in addition to reading, classes, and therapy), I have been able to cope with the ramifications of my actions and life in general. . . .

Psychologically, I forced myself to evaluate my relationship with alcohol. While I had never considered myself to have a drinking habit and certainly did not consider myself to have a drinking problem or ever abused alcohol, I sought out a therapist, attended the required DUI and AA classes mandated by the court, and stopped drinking entirely for several months. I wanted to make sure that I was not in denial about my relationship with alcohol.

# $[\P] \dots [\P]$

Through the court mandated and voluntary mental health and support groups, as well as numerous hours throughout the next few months of self-reflection, I realized that my drinking alcohol was related to anxiety and social issues. In the end, I realized that I wasn't addicted to alcohol, but in reality I was addicted to being "liked." With that realization, in addition to more regular exercises and meditation, I felt strongly that from that point forward I would be able to better protect myself from the bad habits that contributed directly to that night I was arrested for DUI after the accident. For a period of time in the later few months of 2015, I resumed some social drinking, but only in very modest amounts (mostly to be polite at social events). I never drank more than four drinks (on most of these occasions only 1-2 drinks) and especially never drove a vehicle after drinking. However, after I received the letter informing me that the Medical Board was concerned about the DUI, I again resumed my abstinence from alcohol and have taken multiple steps to prove to the Board that the DUI was an aberration in my life and my professional career.

# $[\P] \dots [\P]$

Finally, I would like to end by saying I am not addicted to alcohol or any substance, and I have done all I can to take the Board's concerns seriously. I have completed several proactive steps in proving a track record of verifiable abstinence from alcohol. I want to reassure the Board that I am responsible and not a substance abusing physician. I have thus far completed more than 3 months of . . . testing (I stopped drinking 2/7/16 but it took me a while to figure out how to set up the random urine testing program). I have taken part in my hospital[']s wellness program. I have the support of my colleagues and even my boss is aware of all that I have been through these past months. I have completed all of the court ordered therapy and group meetings. I have been evaluated by two highly qualified addiction medicine specialists who both agree that I do not have any addictive behaviors related to alcohol.

#### $[\P] \dots [\P]$

I understand the serious nature of getting a DUI and that protection of the public is critically important. I want to assure the Board that this is not something that will ever happen again.

#### (Exhibit 12.)

- 16. Respondent was born in India and moved to the United States with his family as an infant. He is married and has two young children.
- 17. Respondent is board certified in internal medicine. He practices as a hospitalist with Health Care Partners in Torrance, working 16 day-shifts and two night-shifts per month, and often works up to six additional night-shifts per month. Respondent divides

his time between Torrance Memorial Medical Center, Providence Little Company of Mary Torrance Medical Center, and Providence Little Company of Mary San Pedro Medical Center (LCOM-San Pedro). He was recently made junior partner with Health Care Partners.

- 18. Respondent has no history of license discipline. His work history remains unblemished. He has never been disciplined by his employer, and never had his hospital privileges suspended, restricted or revoked. He has never been sued for malpractice. Other than the 2014 DUI, he has never been arrested or convicted of a crime.
- 19(a). In his testimony at the administrative hearing, Respondent's demeanor was contemplative and candid, and he presented as a credible witness. He readily acknowledged that he demonstrated poor judgment when he drank alcohol and drove and that he placed himself and others at risk. Respondent expressed sincere remorse for driving while intoxicated noting several times that it was a very "stupid" and "irresponsible" decision.
- 19(b). Respondent recalled that, after the accident, he felt a deep sense of shame and guilt because it was "the worst thing [he] had ever done." He chose to "re-examine everything" to determine if he had a problem with alcohol. Through his DUI program, AA, therapy, and self-examination, he learned he has social anxiety issues for which he used alcohol as "a social lubricant." The programs and AA classes helped him to "work through all of that."
- 19(c). Respondent recalled that in college he drank alcohol several times a month, but after starting medical school he drank less often, and during residency he drank alcohol three to four times per month. After his wife became pregnant, his alcohol consumption decreased to two to three times per month, which usually consisted of two to three glasses of wine at home or four to five drinks when out with friends. After the accident, while participating in the court-ordered DUI program, the instructor recommended abstaining from alcohol, and Respondent complied. Since the accident in November 2014, Respondent has consumed alcohol only about four times during the period he was experimenting with controlled social drinking. He last drank alcohol on February 7, 2016 at a Super Bowl party. From that point forward, he decided to completely abstain from alcohol consumption.
- 19(d). Respondent does not believe he has a problem with alcohol and does not feel that it is "a big part of [his] life." He does not think about alcohol every day and is not tempted to drink it. Since resolving to abstain from alcohol consumption, he has been in several social situations where alcohol was served, and he did not drink. These events reinforced his understanding that he can have fun and engage in meaningful conversations in social situations without consuming alcohol.
- 19(e). Following his DUI, Respondent began attending regular therapy sessions with Dr. Friedman and started meditating twice per day. He believes that meditation has been the most beneficial, life-altering change leading him to practice mindfulness and making him aware of the thoughts and emotions which lead to his actions and allowing him to form good habits. A collateral benefit of the mindfulness is that he has been "mindful about eating" and has lost 25 pounds in the past 10 months. Additionally, as a result of his injury and weeks of

hospitalization, he has learned what patients experience and can now more fully consider the patients' experience when he provides treatment.

- 19(f). As part of his rehabilitative efforts, Respondent has strived to make amends for his actions on November 29, 2014. He has tried to analyze his relationship with alcohol and to become a better person in general, not just for the sake of the Board. Paradoxically, the most "irresponsible" event of his life has helped him to grow as a person and reach a much better place than he was before. He is grateful for the opportunity to work toward this change and wishes to "continue to move forward and move past this one horrible mistake."
- 19(g). When he thinks about the DUI, he still feels panicked about what could have happened, and he is so grateful that his brother was not injured. He mused that he "almost lost everything" on that fateful night. He put his wife "through all this," he jeopardized his career and his ability to practice medicine, and "if something had happened to [him, his] youngest daughter [conceived after the accident] would not have existed." Respondent assured the Board that "this was such a dramatic event, that [he] will not do anything like this again." He pointed out that he has "way too much in life to lose" and he has taken steps to ensure "this will never happen again."
- 19(h). Respondent agreed that public protection is more important than any negative consequence to him. However, he did not feel that the oversight of probation is required. He knows he made a "horrible mistake," but he pointed out that he has "changed [his] life and proven to [the Board] and [to himself] that [he does] not have a substance abuse problem." He understands that probation is imposed for public safety, but he insists that he is devoted to his patients and a detailed clinician and does not pose any danger to the public. He hopes that his one night of poor decision making will not reflect his entire life and who he truly is.
- 20. Respondent has the support of his wife, his supervisor, his colleagues, and the Chief of Staff at LCOM-San Pedro who testified and submitted letters on his behalf collectively describing him as an excellent, professional, and compassionate physician and someone for whom drinking excessively or drinking and driving was out of character.

### LEGAL CONCLUSIONS

- 1. Cause exists to revoke or suspend Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code sections 2234, subdivision (a), 2236, subdivision (a), and 490, and California Code of Regulations, title 16, section 1360, on the grounds that Respondent has been convicted of a crime substantially related to the qualifications, functions and duties of a licensed physician and surgeon, as set forth in Factual Findings 4 through 6, and Legal Conclusion 4.
- 2(a). Cause exists to revoke or suspend Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code sections 2234, subdivision (a), and 2239, on the grounds that Respondent used alcoholic beverages in such a manner as to be

dangerous to Respondent and to the public, as set forth in Factual Findings 4 through 6, and Legal Conclusions 2(b) and 4.

- 2(b). Business and Professions Code section 2239 provides:
  - (a) The use or prescribing for or administering to himself or herself, of any controlled substance; or the use of any of the dangerous drugs specified in Section 4022, or of alcoholic beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to any other person or to the public, or to the extent that such use impairs the ability of the licensee to practice medicine safely or more than one misdemeanor or any felony involving the use, consumption, or self-administration of any of the substances referred to in this section, or any combination thereof, constitutes unprofessional conduct. The record of the conviction is conclusive evidence of such unprofessional conduct.
  - (b) A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this section. The Division of Medical Quality may order discipline of the licensee in accordance with Section 2227 or the Division of Licensing may order the denial of the license when the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, complaint, information, or indictment.
- 3. Cause exists to revoke or suspend Respondent's physician's and surgeon's certificate, pursuant to Business and Professions Code section 2234, subdivision (a), on the grounds that Respondent engaged in unprofessional conduct, as set forth in Factual Findings 4 through 6, and Legal Conclusions 2(b) and 4.
- 4(a). California Code of Regulations, title 16, section 1360 provides, in pertinent part:
  - [A] crime or act shall be considered to be substantially related to the qualifications, functions or duties of a person holding a license, certificate or permit under the Medical Practice Act if to a substantial degree it evidences present or potential unfitness of a person holding a license, certificate or permit to perform the functions authorized by the license, certificate or permit in a manner consistent with the public health, safety or welfare.

4(b). Driving under the influence of alcohol, even if it is a single instance, is substantially related to the qualifications, functions and duties of a physician in that it evidences a potential unfitness to practice medicine. In *Watson v. Superior Court* (2009) 176 Cal.App.4th 1407, the Court held:

Convictions involving alcohol consumption reflect a lack of sound professional and personal judgment that is relevant to a physician's fitness and competence to practice medicine. Alcohol consumption quickly affects normal driving ability, and driving under the influence of alcohol threatens personal safety and places the safety of the public in jeopardy. It further shows a disregard of medical knowledge concerning the effects of alcohol on vision, reaction time, motor skills, judgment, coordination and memory, and the ability to judge speed, dimensions, and distance. [Citation.] [¶] Driving while under the influence of alcohol also shows an inability or unwillingness to obey the legal prohibition against drinking and driving and constitutes a serious breach of a duty owed to society.

(176 Cal.App.4th at p. 1420 (citing Griffiths v. Sup. Ct. (2002) 96 Cal.App. 4th 757, 770-771.)

5. Pursuant to California Code of Regulations, title 16, section 1360.1:

When considering the suspension or revocation of a license, certificate or permit on the ground that a person holding a license, certificate or permit under the Medical Practice Act has been convicted of a crime, the division, in evaluating the rehabilitation of such person and his or her eligibility for a license, certificate or permit shall consider the following criteria:

- (a) The nature and severity of the act(s) or offense(s).
- (b) The total criminal record.
- (c) The time that has elapsed since commission of the act(s) or offense(s).
- (d) Whether the licensee, certificate or permit holder has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against such person.
- (e) If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.
- (f) Evidence, if any, of rehabilitation submitted by the licensee, certificate or permit holder.

- 6(a). "Administrative proceedings to revoke, suspend, or impose discipline on a professional license are noncriminal and nonpenal; they are not intended to punish the licensee, but rather to protect the public." (*Griffiths, supra*, 96 Cal.App. 4th 757, 768, citing *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785–786.)
  - 6(b). Business and Professions Code section 2229 provides in pertinent part:
    - (a) Protection of the public shall be the highest priority for the Division of Medical Quality . . . and administrative law judges of the Medical Quality Hearing Panel in exercising their disciplinary authority.
    - (b) In exercising his or her disciplinary authority an administrative law judge of the Medical Quality Hearing Panel, [or] the division . . . shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee. . . .
  - 7. Business and Professions Code section 2227, subdivision (a), provides:
    - (a) A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code . . . and who is found guilty, or who has entered into a stipulation for disciplinary action with the division, may, in accordance with the provisions of this chapter:
    - (1) Have his or her license revoked upon order of the division.
    - (2) Have his or her right to practice suspended for a period not to exceed one year upon order of the division.
    - (3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the division.
    - (4) Be publicly reprimanded by the division.
    - (5) Have any other action taken in relation to discipline as part of an order of probation, as the division or an administrative law judge may deem proper.
- 8(a). In addressing the Board's paramount concern, protection of the public, the analysis must focus on the likelihood that Respondent will again use alcohol in a dangerous manner. The Board is not required to postpone imposition of discipline until a problem with alcohol begins to affect a physician's work. (*In re Kelley* (1990) 52 Cal.3d 487, 495.) A physician suffering from clouded judgment may cause harm

or death, and even one instance of work-related alcohol use could pose a grave danger to patients. However, there must be likelihood of recidivism which requires protection of the public. Additionally, as set forth in Business and Professions Code sections 2227 and 2229, there are several types of discipline which may be imposed to serve the goals of licensee rehabilitation and public protection.

- 8(b). While even a single DUI may evidence a <u>potential</u> unfitness to practice medicine (and is thus substantially related to the practice of medicine), in this case, the evidence established that Respondent does not have a substance abuse disorder and does not pose a future threat to patients and to the public in general. The credible testimonies of Dr. Skipper, Dr. Friedman and Respondent established that there is no likelihood of recidivism based on any underlying psychological disorder and that there is no need to provide treatment (clinical evaluation, rehabilitation counseling, urine testing, etc.) for a disorder which does not exist.
- 8(c). Nevertheless, even absent an underlying disorder, the analysis must address the likelihood that Respondent will engage in any future lack of judgment similar to that single instance on the night of Respondent's DUI. In this case, Respondent's DUI was an aberration in his typically law-abiding life. Two years have elapsed since his DUI, and he has complied with the terms of his criminal probation. Respondent has acknowledged his "irresponsible" actions and poor judgment and expressed sincere remorse for his wrongdoing. Respondent also took affirmative actions to determine the root cause of his misuse of alcohol, sought professional treatment, and instituted lifestyle changes to address his anxiety. Although Respondent does not have a substance abuse disorder, given the near catastrophic effect of his alcohol use and his concerns about even controlled social drinking, Respondent resolved to abstain from further use of alcohol. Respondent appears to understand that abstaining from alcohol consumption is a minimal and worthwhile price to pay to protect his license, his life, and the lives and welfare of the public. Given Respondent's recognition of the near loss of everything he holds dear and his determined efforts to avoid recidivism, his assurance that he will not reoffend was persuasive.
- 8(d). Based on the totality of the evidence, imposition of discipline in the form of probation and probationary terms (which would include psychological evaluation, group therapy, and biological fluid testing) is not warranted to ensure public safety, nor is there any need to impose such discipline for rehabilitative purposes. Consequently, a public reprimand will best protect the public without imposing overly harsh and punitive discipline on Respondent.
- 9(a). Complainant asserts that probation, and thus the Uniform Standards for Substance-Abusing Licensees, must be applied in this case. Respondent disagrees.

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- 9(b). The Board's Manual of Model Disciplinary Orders and Disciplinary Guidelines (11th Edition/2011) has been supplemented by the Board's Uniform Standards for Substance Abusing Licensees (2015) as follows:
- (1). California Code of Regulations, title 16, section 1361 (Disciplinary Guidelines and Exceptions for Uniform Standards Related to Substance-Abusing Licensees), provides in pertinent part:
  - (a) In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code section 11400 et seq.), the Medical Board of California shall consider the disciplinary guidelines entitled "Manual of Model Disciplinary Orders and Disciplinary Guidelines" (11th Edition/2011) which are hereby incorporated by reference. Deviation from these orders and guidelines, including the standard terms of probation, is appropriate where the Board in its sole discretion determines by adoption of a proposed decision or stipulation that the facts of the particular case warrant such a deviation for example: the presence of mitigating factors; the age of the case; evidentiary problems.
  - (b) Notwithstanding subsection (a), the Board shall use the Uniform Standards for Substance-Abusing Licensees as provided in section 1361.5, without deviation, for each individual determined to be a substance-abusing licensee. . . . (Emphasis added.)
- (2). California Code of Regulations, title 16, section 1361.5 (Uniform Standards for Substance-Abusing Licensees), provides in pertinent part:
  - (a) If the licensee is to be disciplined for unprofessional conduct involving the use of illegal drugs, the abuse of drugs and/or alcohol, or the use of another prohibited substance as defined herein, the licensee shall be presumed to be a substance-abusing licensee for purposes of section 315 of the Code.
  - (b) Nothing in this section shall prohibit the Board from imposing additional terms or conditions of probation that are specific to a particular case or that are derived from the Board's disciplinary guidelines referenced in section 1361 that the Board determines is necessary for public protection or to enhance the rehabilitation of the licensee.
  - (c) The following probationary terms and conditions shall be used without deviation in the case of a substance-abusing licensee: (1) Clinical Diagnostic Evaluations and Reports; [¶] (2) Notice of Employer or Supervisor Information; [¶] (3) Biological Fluid Testing;

- [¶] (4) Group Support Meetings; [¶] (5) Worksite Monitor Requirements and Responsibilities; [¶] and (6) The licensee must remain in compliance with all terms and conditions of probation. . . . (Emphasis added.)
- 9(c). The language of California Code of Regulations, title 16, sections 1361 and 1361.5 indicate that, although the probationary terms and conditions from the Uniform Standards for Substance-Abusing Licensees must be followed without deviation, a variation from the Manual of Model Disciplinary Orders and Disciplinary Guidelines is allowed. Given the discretion allowed in Business and Professions Code section 2227, a variation from the Manual of Model Disciplinary Orders and Disciplinary Guidelines would include imposition of discipline other than probation, such as public reprimand.
- 10(a). The language of California Code of Regulations, title 16, sections 1361 and 1361.5 requires that, if a licensee is disciplined for unprofessional conduct involving the abuse of alcohol, "the licensee shall be presumed to be a substance-abusing licensee," and the "probationary terms and conditions [from the Uniform Standards for Substance-Abusing Licensees] shall be used without deviation in the case of a substance-abusing licensee." In this case, the presumption that Respondent is a substance abusing licensee has been rebutted. Additionally, the language of the regulations apparently presumes that the discipline imposed on the licensee will be probation, rather than a public letter of reprimand. This language calls into question the effect of the regulations on statutory discretion afforded when imposing discipline.
- 10(b). Business and Professions Code section 2227 identifies probation and public reprimand as separate and distinct forms of license discipline. In this case, no probation is imposed, and there is no cited statute or case law which specifically requires the probationary terms in the Uniform Standards for Substance-Abusing Licensees to be imposed along with a public reprimand. If the probationary terms set forth in the Uniform Standards for Substance-Abusing Licensees must be imposed with any discipline, this would convert all discipline to probation, including instances where probation is not warranted. This would negate the discretion afforded in Business and Professions Code section 2227 and acknowledged in California Code of Regulations, title 16, section 1361, subdivision (a). Such an unreasonable interpretation of the disciplinary statutes and regulations would result in unduly punitive discipline in some cases. Given the foregoing, California Code of Regulations, title 16, sections 1361 and 1361.5 do not mandate the imposition of the probationary terms and conditions in the Uniform Standards for Substance-Abusing Licensees when a public reprimand is issued, as in this case.

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# **ORDER**

Respondent is hereby reprimanded within the meaning of Business and Professions Code section 2227, subdivision (a)(4), and is publicly reproved under the provisions of Business and Professions Code section 495, for the conduct specified in Factual Findings 4 through 6, and Legal Conclusions 1 through 4.

DATED: December 2, 2016

—Docusigned by:
Julic Cahos—Owen

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JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings

1 2 3 4 5 6 7	KAMALA D. HARRIS Attorney General of California JUDITH T. ALVARADO Supervising Deputy Attorney General BRIAN D. BILL Deputy Attorney General State Bar No. 239146 California Department of Justice 300 So. Spring Street, Suite 1702 Los Angeles, CA 90013 Telephone: (213) 897-9474 Facsimile: (213) 897-9395 Attorneys for Complainant	FILED STATE OF CALIFORNIA MEDICAL BOARD OF CALIFORNIA SACRAMENTO March 2320/6 BY K. VOOZG ANALYST	
8	BEFORE		
9	MEDICAL BOARD OF CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS		
10	STATE OF CA	LIFORNIA	
11	In the Matter of the Accusation Against:	Case No. 800-2015-013153	
12	1	ACCUSATION	
13	3330 Lomita Blvd., Torrance, CA 90505		
14	Physician's and Surgeon's Certificate No. A118825,		
15	Respondent.		
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17			
18	Complainant alleges:	TE C	
19 20	PART		
21	1. Kimberly Kirchmeyer (Complainant) brings this Accusation solely in her official		
22	capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs (Board).		
23		lical Board issued Physician's and Surgeon's	
24	2. On or about October 26, 2011, the Medical Board issued Physician's and Surgeon's Certificate Number A118825 to Vivek Chander Gupta, M.D. (Respondent). The Physician's and		
25	Surgeon's Certificate was in full force and effect at all times relevant to the charges brought herein		
26	and will expire on September 30, 2017, unless renewed.		
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#### **JURISDICTION**

- 3. This Accusation is brought before the Board, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.
  - 4. Section 2227 of the Code states:
- "(a) A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or whose default has been entered, and who is found guilty, or who has entered into a stipulation for disciplinary action with the board, may, in accordance with the provisions of this chapter:
  - "(1) Have his or her license revoked upon order of the board.
- "(2) Have his or her right to practice suspended for a period not to exceed one year upon order of the board.
- "(3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the board.
- "(4) Be publicly reprimanded by the board. The public reprimand may include a requirement that the licensee complete relevant educational courses approved by the board.
- "(5) Have any other action taken in relation to discipline as part of an order of probation, as the board or an administrative law judge may deem proper.
- "(b) Any matter heard pursuant to subdivision (a), except for warning letters, medical review or advisory conferences, professional competency examinations, continuing education activities, and cost reimbursement associated therewith that are agreed to with the board and successfully completed by the licensee, or other matters made confidential or privileged by existing law, is deemed public, and shall be made available to the public by the board pursuant to Section 803.1."
  - 5. Section 2234 of the Code, states:
- "The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

- "(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.
  - 6. Section 2236 of the Code states:
- "(a) The conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct within the meaning of this chapter [Chapter 5, the Medical Practice Act]. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred.
- "(b) The district attorney, city attorney, or other prosecuting agency shall notify the Division of Medical Quality of the pendency of an action against a licensee charging a felony or misdemeanor immediately upon obtaining information that the defendant is a licensee. The notice shall identify the licensee and describe the crimes charged and the facts alleged. The prosecuting agency shall also notify the clerk of the court in which the action is pending that the defendant is a licensee, and the clerk shall record prominently in the file that the defendant holds a license as a physician and surgeon.
- "(c) The clerk of the court in which a licensee is convicted of a crime shall, within 48 hours after the conviction, transmit a certified copy of the record of conviction to the board. The division may inquire into the circumstances surrounding the commission of a crime in order to fix the degree of discipline or to determine if the conviction is of an offense substantially related to the qualifications, functions, or duties of a physician and surgeon.
- "(d) A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of this section and Section 2236.1. The record of conviction shall be conclusive evidence of the fact that the conviction occurred."
  - 7. Section 2239 of the Code states:
- "(a) The use or prescribing for or administering to himself or herself, of any controlled substance; or the use of any of the dangerous drugs specified in Section 4022, or of alcoholic beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to any other person or to the public, or to the extent that such use impairs the ability of the licensee to practice medicine safely or more than one misdemeanor or any felony involving the use,

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consumption, or self-administration of any of the substances referred to in this section, or any combination thereof, constitutes unprofessional conduct. The record of the conviction is conclusive evidence of such unprofessional conduct. 1

"(b) A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this section. The Division of Medical Quality may order discipline of the licensee in accordance with Section 2227 or the Division of Licensing may order the denial of the license when the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, complaint, information, or indictment."

#### 8. Section 490 of the Code states:

"(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

"(b) Notwithstanding any other provision of law, a board may exercise any authority to discipline a licensee for conviction of a crime that is independent of the authority granted under subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the licensee's license was issued.

"(c) A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action that a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is

<sup>&</sup>lt;sup>1</sup> There is a nexus between a physician's use of alcoholic beverages and his or her fitness to practice medicine, established by the Legislature in section 2239, "in all cases where a licensed physician used alcoholic beverages to the extent or in such a manner as to pose a danger to himself or others." (Watson v. Superior Court (Medical Board) (2009) 176 Cal. App. 4th 1407, 1411).

made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

- "(d) The Legislature hereby finds and declares that the application of this section has been made unclear by the holding in *Petropoulos* v. *Department of Real Estate* (2006) 142 Cal.App.4th 554, and that the holding in that case has placed a significant number of statutes and regulations in question, resulting in potential harm to the consumers of California from licensees who have been convicted of crimes. Therefore, the Legislature finds and declares that this section establishes an independent basis for a board to impose discipline upon a licensee, and that the amendments to this section made by Senate Bill 797 of the 2007 -08 Regular Session do not constitute a change to, but rather are declaratory of, existing law."
  - 9. California Code of Regulations, title 16, section 1360, states:

"For the purposes of denial, suspension or revocation of a license, certificate or permit pursuant to Division 1.5 (commencing with Section 475) of the code, a crime or act shall be considered to be substantially related to the qualifications, functions or duties of a person holding a license, certificate or permit under the Medical Practice Act if to a substantial degree it evidences present or potential unfitness of a person holding a license, certificate or permit to perform the functions authorized by the license, certificate or permit in a manner consistent with the public health, safety or welfare. Such crimes or acts shall include but not be limited to the following: Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of the Medical Practice Act."

# **FIRST CAUSE FOR DISCIPLINE**

#### (Conviction of a Crime)

10. Respondent Vivek Chander Gupta, M.D. is subject to disciplinary action under section 2234, subsection (a), section 2236, subdivision (a), and section 490 of the Code and California Code of Regulations, title 16, section 1360, in that he has been convicted of a crime, driving under the influence of an alcoholic beverage, in violation of Vehicle Code section 23152(a). This conviction is substantially related to the qualifications, function, or duties of a physician and surgeon. The circumstances are as follows:

- 11. On or about November 29, 2014, at approximately 7:53 p.m., Respondent was driving his motor vehicle on Vista Del Valle Road in the County of Riverside. Respondent was accompanied by passenger "P1," a minor on the date of incident. Respondent was driving approximately 25 miles per hour in a 10 mile per hour zone and attempted to navigate a sharp curve. However, due to the excessive speed, the vehicle skidded off the roadway and rolled over.
- 12. California Highway Patrol Officer S.S. (No. 019634) was called to investigate the accident. Upon his arrival, Officer S. observed that Respondent's vehicle had sustained substantial damage as a result of the roll-over accident. Additionally, Officer S. observed fire personnel attempting to extract Respondent from the driver's seat of the vehicle. Officer S. then contacted P-1 who confirmed that Respondent was driving the vehicle at the time of the accident.
- 13. Respondent was transported to Riverside County Regional Medical Center to obtain treatment for his injuries. Officer S. interviewed Respondent at the hospital. Officer S. observed that Respondent's eyes were red and watery and that an odor of an alcoholic beverage emanated from his person; both observations are signs and symptoms consistent with alcohol use. During the interview, Respondent admitted that he was driving the vehicle and that he consumed "way too much" alcohol. Officer S. asked Respondent a series of "pre-field sobriety test questions." Due to Respondent's injuries, Officer S. administered only one Field Sobriety Test (FST), the Horizontal Gaze Nystagmus. Respondent's performance on this FST was consistent with alcohol use. Based upon Respondent's admissions to drinking, the observed signs and symptoms of alcohol intoxication and the performance on the FST, Officer S. formed the opinion that Respondent was under the influence of alcohol. Officer S. arrested Respondent for violating Vehicle Code section 23152. A blood sample taken from Respondent was tested and revealed his blood alcohol level to be 0.22.

# SECOND CAUSE FOR DISCIPLINE

# (Use of Alcoholic Beverages in a Dangerous Manner)

14. By reason of the facts set forth above in paragraphs 10 through 13, Respondent is subject to disciplinary action under section 2234, subsection (a) and section 2239 of the Code and California Code of Regulations, title 16, section 1360, in that he used alcoholic beverages, to the